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No. 813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE EPCAR COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF TO BRIEF FOR THE UNITED STATES IN OPPOSITION

EDWIN JASON DRYER
1201 Shoreham Building
Washington, D. C. 20005

IRVING H. BIELE
HOWARD N. JONES
117 East 4th South
Salt Lake City, Utah 84111

Attorneys for Petitioner

Of Counsel:

MEYERS & DRYER
1201 Shoreham Building
Washington, D. C. 20005

BIELE, JONES & MURPHY
117 East 4th South
Salt Lake City, Utah 84111

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OCTOBER TERM, 1967

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

PRELIMINARY STATEMENT

Respondent, in its Brief in Opposition, has raised points completely apart from the issues presented by the petitioner. Such new matter requires reply and hence this reply brief.

Petitioner presented for resolution by this Court a conflict between the Court of Appeals for the Tenth Circuit (in the instant case below) on the one hand and, on the other, decisions of the Court of Claims and this Court. The conflict concerns 1) a question of general contract law and contract interpretation and 2) whether that general law is binding upon the United States as a party to a contract negotiation.[1] On this issue and this conflict the brief in opposition is virtually silent.[2] Instead that brief makes essentially two points:

1) (Ignoring the applicability of contract law) the government asserts that its regulation and the bid deposit requirement are "solely for the protection of

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[1] More precisely, the questions are whether the government established a condition precedent when it set forth a minimum bid deposit requirement in its "Invitation for Bid" and whether, in the event of failure of this condition precedent, the United States has special powers not enjoyed by private contracting parties unilaterally to waive this condition precedent to the creation of an enforceable contract. (*See* Petition, pp. 2-3.)

[2] The government's only reference to this conflict is to dismiss *Brown & Son Electric Co.* v. *United States*, 325 F. 2d 446 (1963 Ct. Cls.), with the assertion: "The Court of Claims decision on which petitioner relies does not suggest that the government may not accept a distinct and unconditioned bid for which an adequate bid deposit has been posted. There is no conflict of decisions and further review by this Court is not warranted." This merely begs the question presented by the petition which is whether the bid deposit requirement applied to the "total amount bid" (as specified in the Invitation for Bid) or applied separately to alternate bids. The petition and the Court of Claims decision (set out in full as appendix E to the petition) deserve more than such cavalier treatment. Especially so in view of that Court's reference to the trend of the Comptroller General's "strict rulings . . . with respect to the bid guaranty requirements expressed in the invitation" and which support the petitioner here. (Pet. App. E-7.)

the government" and "are not intended to confer rights on persons dealing with the government." (Br. 7)

2) (Ignoring again the applicability of general contract law) the government asserts that the regulations in respect to bid deposit requirements were properly applied by the contracting officer. (Br. 7-10)

We reply to these points.[3]

ARGUMENT

I

THE GOVERNMENT'S RIGHT TO WAIVE ITS REGULATIONS

Petitioner's reply to the government's Point I is merely that petitioner's case does not involve any challenge to the cases cited. They merely establish that "*prospective* bidders" or "*prospective or potential* sellers" cannot complain of irregularity in the application of the government's regulations.[4] But these cases do not abrogate contract law or the rights of a

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[3] In the interest of completeness we should also note the government's prominent reference to a statement by the petitioner: "I am not protesting or objecting to award of items 1-83 . . .". (Br. 5). The reference and its prominence are misleading. This is but one communication in a course of negotiations and none of the courts below viewed this as any waiver. The factual issue of waiver, if any, would, of course, be for determination by the trial court. There was no such finding.

[4] Italics supplied, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 126-7 (1939). "It [the Public Contracts Act] was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain." (at 127.)

party when suing or sued by the government on a contract.[5]

II

APPLICABILITY OF THE GOVERNMENT'S REGULATIONS AND COMPTROLLER GENERAL DECISIONS

The government, under its Point II, asserts that "in any event" the contracting officer correctly construed his authority to grant an award when the bid deposit requirement had not been met. We should note, of course, that the discussion of his authority is altogether in terms of the applicable regulations and does not go to the question of *contractual* power. Even within the regulations, however, respondent's case fails.

A. The California Truck Parts Case

The government cites as controlling the *California Truck Parts* case (Comp. Gen. Dec. B-141637, 39 Comp.

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[5] If *Adelhardt Const. Co.* v. *U. S.*, 107 F. Supp. 845 (1952 Ct. Cls.), cited by respondent (Br. 7) is to the contrary then it was overruled by the subsequent *Brown & Son* case, supra. The cases are consistent, however. In *Adelhardt* the United States withheld moneys from a defaulting contractor who claimed that, because he had not submitted the required bid guarantee, "there never was any contract in the first place" (at p. 846). The case is distinguishable from the case at bar in that it turned on a finding of *mutual waiver* of the condition precedent. The contractor was deemed to have waived the bid requirement: ". . . plaintiff still considered that its offer was outstanding" [despite the absence of the guarantee] (p. 846). The Court then added: "Accordingly, we hold that in the circumstances disclosed here defendant [United States] was not legally powerless to accept the plaintiff's bid." Clearly contract law was being applied in its normal context and *each side* deemed to have waived failure of a condition precedent.

Gen. 617, 618). But this decision arose out of a 1959 altercation and was issued in 1960. *Subsequent* to the *California Truck Parts* decision the Comptroller General in three consistent decisions has overruled that case and has held that the bid guarantee provision of the invitation for bid is a material part of the contract and should be strictly enforced, even though the best interests of the government might be served by waiver thereof. Pertinent portions of these decisions are as follows:

> "It was argued that it would be in the best interest of the Government to waive the late filing of the bid bond because the government would thereby effect a saving of a large amount of money; that the bid guarantee requirement in this case is arbitrary and serves no national purpose; and that the government has an inherent right to waive any regulation when, by so doing, the government is benefited."
>
> "The new rule (forbidding waiver and variation from bid requirement) insured that in formally advertised procurement all bidders will be competing on a common basis and that the contract will in each case be awarded with reasonable promptness, as required by law to the lowest responsible and responsive bidder. . . . It remains our opinion that the bid guarantee provisions of an invitation for bid should be strictly enforced. . . ." (*Cosmos Industries, Inc.,* 43 Comp. Gen. 268, Sept. 17, 1963.)

See also *Kehne Electric Company,* (43 Comp. Gen. 725, June 21, 1965) and a recent (February 17, 1965) Comptroller General Decision wherein it was stated:

> "The Bid Bond deficiency cannot be waived as a minor technicality . . . which if permitted would

> tend to compromise the integrity of the competitive bid system my making it possible for a bidder to decide after bid opening whether or not to make his bid acceptable and therefore correction of the bid bond may not be acknowledged." (*Maritime Maintenance Decision,* Comp. Gen. Dec. B-155837, 44 Comp. Gen. 495)

Interestingly, this trend of the Comptroller General decisions is confirmed in one of the court cases cited by respondents. In *U. S.* v. *Stewart,* 234 F. Supp. 94 (D.C.D.C. 1964), affirmed, 339 F. 2d 753 (C.A.D.C.) the plaintiffs had submitted a bid for the construction of an underground garage near the Capitol which was the low bid but accompanied by an insufficient bid bond. While they lacked standing to challenge the award to the next bidder under the doctrine of *Perkins* v. *Lukens Steel Co., supra,* Judge Holtzoff noted that *the Comptroller General had ruled that this bid bond insufficiency "barred" award to the Plaintiffs* (at 96).

Finally, it should be noted that the Special Sealed Bid provision here in issue was not adopted until five years after the *California Truck Parts* decision and therefore the effect of this special provision could not have been considered there despite the government's suggstion to the contrary (Br. 9).

B. The Fictitious Distinction Between Brown & Son and the Case at Bar

Since *Brown & Son* is a Court of Claims decision clearly at odds with the government's position here (as adopted by the court below) the government's next effort is to distinguish that case. The government asserts: "However, in *Brown,* unlike the instant case

a division of the work would have been 'impracticable' and 'contrary to stated limitations' in the invitation and bid." (Br. 10).

Aside from the fact that this terminology is taken from the *California Truck Parts* case subsequently much curtailed, it does not appear that these factors were even considered by the Court in reaching its decision in *Brown & Son.* Instead the *Brown & Son* decision turned on the normal meaning of the bid language and the Court found that "20% of the bid price . . ." meant "the full amount bid, not merely the base bid." (Pet. App. E-6). Having so interpreted the bid language, the Court then ruled in favor of rejection of the bid with the insufficient bond. The same action is required here.

CONCLUSION

The references contained in the government's Brief in Opposition are basically red herrings. The simple issue presented to the Supreme Court is the determination of whether or not the fundamental principles of contract interpretation should be applied equally and uniformly in interpreting contracts wherein the government is involved as a party. It is respectfully submitted that the writ of certiorari should be granted and this Honorable Court should settle the confusion among existing decisions and reaffirm that fundamental contract law applies in interpreting contracts where the government is a party.

Respectfully submitted this 28th day of November, 1967.

EDWIN JASON DRYER
1201 Shoreham Building
Washington, D. C. 20005

IRVING H. BIELE
HOWARD N. JONES
117 East 4th South
Salt Lake City, Utah 84111

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